Supreme Court, U.S.
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No. 06-1048

IN THE

Supreme Court of the United States

Keith McFarland,

Petitioner,

v.

Bryan Cave LLP, Paul Weil, Marshall & Stevens, Incorporated, Carl G. Hogan, Jr., Brian J. Hogan, and David Hogan,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. **Whether petitioner has stated a RICO conspiracy claim since he is unable to identify any property obtained by the conspirators pursuant to the alleged predicate Hobbs Act violation as required by *Scheidler v. Nat'l Organization for Women Inc.*, 537 U.S. 393 (2003).**

2. **Whether petitioner has standing under RICO to recover for alleged wrongful termination of his employment and, if so, whether *Beck v. Prupis*, 529 U.S. 494 (2000), should be overruled.**

3. **Whether petitioner has adequately pleaded a pattern of racketeering activity.**

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RESPONDENTS' BRIEF IN OPPOSITION

Defendants-Respondents Bryan Cave LLP, Paul Weil, Carl G. Hogan, Jr., Brian J. Hogan, and David Hogan file this Brief in Opposition to the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Because this case arises from a motion to dismiss, the factual allegations in the Amended Complaint are taken as true.

On January 14, 2001, Carl G. Hogan, Sr. died, leaving his three sons as co-executors of his estate. His sons hired Paul Weil, an attorney at Bryan Cave LLP to assist in the preparation of estate tax returns. Plaintiff alleged that these

defendants formed a conspiracy "whose fundamental goal was to illegally prepare and file federal and state tax returns" (App. 32a).

Plaintiff Keith McFarland was assigned to the Hogan file to prepare an appraisal of a Hogan real estate development partnership. McFarland claimed that during a conference with Weil and other appraisers, Weil attempted to influence his valuations by supplying what plaintiff believed to be false information. Weil allegedly threatened to ruin plaintiff's career if he did not agree to modify his appraisal.

McFarland advised his employer, Defendant-Respondent Marshall & Stevens ("M&S"), that in his view it would be illegal to provide appraisals based on the values that had been generated. He recommended that M&S withdraw from the project. Thereafter, plaintiff alleged, M&S renegotiated its fee with the Hogans and agreed to join in the conspiracy to defraud the government (App. 25a). When McFarland refused to join in the purported conspiracy, M&S announced that he had become a problem (App. 36a). The would-be conspirators agreed that all of McFarland's prior draft appraisals would be destroyed (App. 36a). As a result of his refusal to sign the appraisal, McFarland was removed from the Hogan file and was later terminated from M&S (App. 39a).

Defendants filed motions to dismiss arguing, among other things, that McFarland lacked standing to bring an action under RICO because he had not been injured by an act of racketeering. The district court found this issue dispositive, noting that the proximate cause of McFarland's injury was the termination of his employment. "All of the damages he seeks result from his loss of employment as an appraiser for M&S" (App. 15a). Relying on this Court's decision in *Beck v. Prupis*, 529 U.S. 494, 500 (2000), the district court explained that:

> "The rationale behind the requirement that a plaintiff's injuries must have been proximately caused by acts of racketeering is that RICO was enacted with an express target — racketeering activity — and only those injuries that are proximately caused by racketeering activity should be actionable under the statute. As a result, McFarland does not have standing to bring a RICO claim as he has not been injured by an act of racketeering." (App. 15a-16a)(citations omitted).

The court refused to exercise supplemental jurisdiction over the state law claims in Counts II and III and dismissed those counts without prejudice (App. 16a-17a).

The Seventh Circuit affirmed in an unpublished opinion, finding the facts at issue in *Beck* "indistinguishable in all material respects." (App. 6a). The Court of Appeals explained that the Supreme Court had made it clear that a RICO plaintiff has standing to recover only to the extent that he has been injured in his business or property by conduct constituting the violation, which in this case would be the defendants' alleged efforts to defraud the government by filing false tax documents. The court noted that the injuries about which McFarland complains, and the corresponding relief that he seeks, were proximately caused by his termination which, wrongful or otherwise, is not an act of racketeering (App. 7a).

REASONS FOR DENYING THE PETITION

The unique facts of this case provide no basis for this Court's exercise of its certiorari power, as plaintiff's Amended

Complaint does not state a viable RICO claim, and the ruling below does not conflict with any decision of any of the circuits and, in fact, is squarely consistent with this Court's existing jurisprudence.

I. Because McFarland Is Incapable of Identifying Any Property Obtained by the Purported Conspirators, His Claim for Violation of the Hobbs Act Fails as a Matter of Law.

Plaintiff argues that a violation of the Hobbs Act constitutes a sufficient predicate act to support his claim under the Racketeering Influenced and Corrupt Organizations Act ("RICO"). 18 U.S.C. §1951; 18 U.S.C. §§ 1962(c)-(d), 1964(c). The Hobbs Act proscribes, in relevant part, acts of robbery or extortion that obstruct, delay, or affect commerce. 18 U.S.C. §1951(a). The Act defines the term "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. 1951(b). The critical issue facing McFarland is whether he is capable of identifying the property that the purported conspirators "obtained," as required by this Court's decision in *Scheidler v. Nat'l Organization for Women Inc.*, 537 U.S. 393 (2003).

Plaintiff argues that defendants committed extortion by appropriating his property consisting of the false appraisal reports he refused to generate while working on the Hogan file. McFarland explains that he was "threatened by the attorney to give up a false report and the labor it took to produce the same, in return for the attorney not destroying his career." (Pet. 13). He concludes that his extortion claim under the Hobbs Act should not have been dismissed since "the property attempted to be acquired had actual and substantial value that would have

ended up in the hands of extortionists." (Pet. 13). This argument suffers from a number of serious flaws.

At the outset, it is questionable whether McFarland's "property" actually exists. He pleaded that he refused to prepare the so-called falsified appraisal report. If so, how could the purported conspirators possibly "obtain" property that never came into existence? Similarly, how could the conspirators obtain "the labor it took to produce" the falsified report, when McFarland steadfastly refused to engage in such labor?

If, as alleged, the purported conspirators placed great value on the preparation of a false appraisal report, the fact remains that they never obtained such a report from McFarland. As for the report he did prepare, McFarland pleaded that the conspirators agreed to destroy it.

RICO is concerned only with actual, concrete financial losses. *See Steele v. Hospital Corp. of America*, 36 F.3d 69, 70 (9th Cir. 1994) (holding that, for RICO standing, the plaintiffs must prove a "concrete financial loss," an actual loss "of their own money," and "not mere 'injury to a valuable intangible property interest'"). McFarland is incapable of identifying any concrete loss of property.

The Court of Appeals took a different approach, assuming that the property at issue existed, but rejecting the notion that the conspirators somehow obtained it. The court explained that McFarland conceded in his Second Amended Complaint that the appraisal report was not his own property. Rather, the report was something he created as an employee of M&S, and it belonged to his employer. The Seventh Circuit concluded that McFarland cannot pursue a claim that defendants wrongfully acquired their *own* property. So viewed,

McFarland's claim for violation of the Hobbs Act defies common sense.

In his Petition, McFarland takes issue with the Court of Appeals' reasoning, arguing that M&S was not part of the conspiracy at the time the alleged threats to his livelihood were made. Therefore, McFarland reasons, he owned the appraisal report (that he refused to create), and M&S did not acquire its own property (Pet. 11). The argument strains credulity. McFarland offers no elaboration as to how he obtained property rights in a report that he refused to create for the benefit of his employer.

McFarland's purpose in advancing these arguments is to substantiate a perceived conflict between the Court of Appeals' decision in this case and this Court's opinion in *Scheidler*, 537 U.S. 393. In *Scheidler*, the Court held that a violation of the Hobbs Act requires not only the deprivation of property, but also the acquisition of property. *Id.* at 404. To hold otherwise, the Court explained, would eliminate the recognized distinction between extortion and the separate crime of coercion. *Id.* at 405.

Curiously, McFarland's primary argument, indeed the caption of his argument, asserts that the Court of Appeals' decision somehow undermines *Scheidler*. McFarland offers the irrelevant observation that prior to this Court's decision in *Scheidler*, courts "found little difficulty upholding extortion cases in which the extortionist didn't own the property or had some legal right to it." (Pet. 12). The Court of Appeals' decision in this case properly followed *Scheidler*, holding that one cannot violate the Hobbs Act without actually obtaining property owned by another. While McFarland appears to be invoking the rationale of *Scheidler*, in actuality the acceptance of his position would require the overruling of *Scheidler*.

McFarland has proffered no reasonable argument for revisiting *Scheidler*, nor has he identified any conflict among the circuits on this issue. The convoluted nature of his argument is reason, in and of itself, to deny his Petition for Certiorari.

II. Retaliatory Discharge for a Refusal to Participate in Illegal Activities Cannot Form the Basis of a RICO Conspiracy Claim.

McFarland also argues that the Court should accept this garden-variety, state-law wrongful termination case because the decision below undermines this Court's decision in *Beck v. Prupis*, 529 U.S. 494 (2000). That is a fairly remarkable statement since the circumstances at issue here are almost identical to those in *Beck*, and both the district court and Court of Appeals dismissed this case on the basis of that decision. Indeed, the Court of Appeals found the facts in this case to be "indistinguishable in all material respects" from *Beck*, and its ruling closely parallels that decision.

In *Beck*, this Court held that an injury caused by an overt act that is not an act of racketeering or otherwise wrongful under RICO is not sufficient to give rise to a cause of action under the Act. The Court of Appeals concluded that McFarland's claim, and the relief he seeks, were proximately caused by the termination of his employment, which is not an act of racketeering. Accordingly, in full accord with this Court's decision in *Beck*, the Court of Appeals affirmed the district court's order dismissing the case. This Court could not reach a contrary decision without overruling *Beck*.

It is now well established that whistle-blowers, or those who suffer an adverse employment action after reporting alleged RICO violations, do not have standing to sue under

RICO for the injury caused by their firing, since the causal nexus between the predicate acts and the employer's decision to take action against the whistle-blowing employee is too tenuous. *Cullom v. Hibernia Nat. Bank*, 859 F.2d 1211, 1216 (5th Cir. 1988). Put simply, retaliatory discharge for a refusal to participate in illegal activities cannot form the basis of a RICO conspiracy claim. *O'Malley v. O'Neill*, 887 F.2d 1557, 1562 (11th Cir. 1989).

As McFarland points out, a plaintiff's right to sue under RICO requires a showing that the defendant's violation was not only a "but for" cause of his injury, but was the proximate cause as well. *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992). Under *Holmes*, RICO claims require a direct relation between the injury asserted and the injurious conduct alleged. In the present case, there is no connection at all between the purported conspirators' goal of defrauding the government and McFarland's termination. Accordingly, McFarland is incapable of establishing the element of proximate causation for his RICO action.

A recent decision of this Court is instructive. In *Anza v. Ideal Supply Corp.*, 126 S.Ct. 1991 (2006), the plaintiff, Ideal, alleged that a business competitor harmed it by defrauding the government tax authority and using the proceeds from the fraud to offer lower prices. This Court held that Ideal could not maintain a RICO claim because there was no direct connection between Ideal's injury and the tax scheme; the direct victim was the State of New York, not Ideal. *Id.* at 1997. The Court concluded that there is "no need to broaden the universe of actionable harms to permit RICO suits by parties who have been injured only indirectly." *Id.* at 1998. The same analysis applies to the present case, which alleges a conspiracy to defraud the government, not McFarland.

III. The Petition Should be Denied Because McFarland Has Failed to Plead a Pattern of Racketeering Activity.

The Court of Appeals, as well as the district court, found that McFarland has no standing to pursue a RICO claim based on this Court's decision in *Beck v. Prupis*, 529 U.S. 494 (2000). Even if we assume that McFarland's allegations support a claim for violation of the Hobbs Act and that *Beck* has no application to this case, the complaint nevertheless fails to state a claim under RICO. Hence, certiorari should be denied.

To adequately plead a RICO claim under §1962(c), a plaintiff must allege (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985); *Goren v. New Vision Int'l., Inc.*, 156 F.3d 721, 727 (7th Cir. 1998). Allegations of fraud in a RICO action are subject to the heightened pleading requirements of Federal Rule of Civil Procedure 9(b). *Id.* at 727. In addition to McFarland's lack of standing to bring a RICO action, his complaint is deficient due to a failure to plead a pattern of racketeering activity.

A pattern of racketeering activity requires the commission of at least two predicate acts of racketeering committed within a ten-year period. 18 U.S.C. § 1961(5). Although at least two predicate acts of racketeering are necessary to form a pattern, two acts alone generally will not suffice. *H.J. Inc. v. Northwestern Bell Tel. Co .*, 492 U.S. 229, 237 (1989).

In addition to at least two predicate acts, a RICO plaintiff must show "that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity." *Id.* at 239. In other words, plaintiff must satisfy the so-called "continuity plus relationship" test: the predicate acts

must be related to one another and pose a threat of continued criminal activity. *Id.* at 239; *see also Sedima*, 473 U.S. at 497 n. 14.

The alleged pattern of racketeering activity in this case appears to be a "closed-ended" pattern under the RICO analysis, in that the predicate acts were completed when the object of the pattern was achieved. Where schemes that have a clear and terminable goal have a natural ending point, such schemes cannot support a finding of any specific threat of continuity. *Vicom, Inc. v. Harbridge Merchant Servs., Inc.*, 20 F.3d 771, 782 (7th Cir. 1994).

A closed-ended pattern of racketeering — a scheme that has ceased to exist — still exhibits the requisite continuity if the predicate acts extended over "a substantial period of time" and threaten to recur in the future. *H.J. Inc.*, 492 U.S. at 242. In making that determination, courts employ the multifactor continuity test outlined in *Morgan v. Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986). Under *Morgan*, continuity is a function of: (1) the length of time over which the predicate acts were committed; (2) the number and variety of predicate acts; (3) the number of victims; (4) the presence of separate schemes; and (5) the occurrence of distinct injuries. *Id.* at 975. This test is to be applied with an eye toward achieving a "natural and common sense" result, recognizing that Congress was concerned in RICO with long-term criminal conduct. *Vicom*, 20 F.3d at 780 citing *H.J. Inc.*, 492 U.S. at 242.

A. Duration of the Conspiracy

The first factor, duration, is "the single most important aspect of the closed-ended continuity analysis" and is "perhaps the closest thing we have to a bright-line continuity test." *Vicom*, 20 F.3d at 780; *Midwest Grinding Co. Inc. v. Spitz*, 976

F.2d 1016, 1024 (7th Cir. 1992). Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement. RICO is concerned with long-term criminal conduct. *H.J. Inc.*, 492 U.S. at 242.

In *Vicom*, for example, the court found that the durational aspect of closed-ended continuity was not satisfied by racketeering predicates spanning a nine-month period. *Vicom*, 20 F.3d at 771. In *Talbot v. Robert Matthews Distributing Co.*, 961 F.2d 654, 663 (7th Cir. 1992), the court found no pattern where a single scheme occurred over a period of years.

In another case, a scheme that lasted at most seven to eight months was held to be precisely the type of short-term, closed-ended fraud that has consistently been deemed not to constitute a pattern. *Uni*Quality, Inc. v. Infotronx, Inc.*, 974 F.2d 918, 922 (7th Cir. 1992). In the case at bar, the alleged scheme lasted, at most, eight months. Thus, McFarland's complaint fails to demonstrate the durational aspect necessary to establish a pattern of racketeering.

B. Number and Variety of Predicate Acts

While plaintiff claims that defendants used interstate wires multiple times to conduct the scheme, repeated use of the mails or wires does not by itself form a pattern. *Hartz v. Friedman*, 919 F.2d 469, 473 (7th Cir. 1990). Although the sheer number of predicate acts might appear at first glance to prove continuity, when it comes to a pattern premised on acts of mail or wire fraud, the volume of mailings is not dispositive. *Midwest Grinding*, 976 F.2d at 1024. The allegations of mail fraud do not pass the *Morgan* test for the number or variety of predicate acts required to show a pattern of racketeering.

C. Number of Victims

In this case, the purported conspiracy had two targets — the State of New Hampshire and the federal government. The fact that there were only two targets of the purported conspiracy further demonstrates that there was no pattern of racketeering.

D. Existence of Separate Schemes

McFarland alleged a single scheme to file false estate tax returns for a single estate. This factor, perhaps more than any other, demonstrates that he is incapable of establishing a pattern of racketeering. Taking together the predicate acts alleged and the *Morgan* multifactor analysis, the conclusion is inescapable that McFarland's allegations cannot support a finding of closed-ended continuity. The closed-ended RICO scheme plaintiff alleged has none of the trappings of a long-term criminal operation that carries with it a continued threat to society. Certiorari should be denied under circumstances where, leaving the issue of standing aside, the complaint fails to state a cause of action.

CONCLUSION

For the reasons stated, Defendants-Respondents Bryan Cave LLP, Paul Weil, Carl G. Hogan, Jr., Brian J. Hogan, and David Hogan respectfully request that the Petition for Certiorari be denied.

Respectfully submitted,

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